Siti Juliana Suen bte Abdullah & Ors v Sungei Wang Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO D8–22–1520 OF 2005
KANG HWEE GEE J
4 APRIL 2007

Civil Procedure — Striking out — Application to strike out action — Limitation period had set in — Court of Appeal had allowed the plaintiffs the liberty to file the same action afresh — Whether that in itself a sustainable issue

The defendants appealed against the decision of the deputy registrar in dismissing their application to strike out the plaintiffs' pleading under O 18 r 19 of the Rules of the High Court 1980 ('RHC') on grounds that the suit filed by the plaintiffs were frivolous, vexatious and an abuse of the process of court. The plaintiffs had initially commenced an action in the Kuala Lumpur High Court but later withdrew the first suit with liberty to file afresh by consent. On 30 October 2002, the plaintiffs filed another action in the High Court of Sabah and Sarawak seeking the same relief as in the first suit but had joined two other parties as defendants. The defendants in the second suit failed to enter appearance. Accordingly, a judgment in default of appearance was obtained by the plaintiffs but it was subsequently set aside by the judge in chambers. In the same proceedings the plaintiffs' action was ordered to be struck out without liberty to file afresh. Upon appeal, the Court of Appeal upheld the dismissal of the plaintiffs' action but allowed the plaintiffs the liberty to file the same action afresh in the High Court of Malaya. Relying on the order of the Court of Appeal the plaintiffs filed this action against the same defendants in this court. In this proceedings, the only ground for appeal was that the period of limitation had set in pursuant to s 6 of the Limitation Act 1953 when the plaintiffs filed this action in this court on 19 October 2005.

Held:

A pleading ought to be struck out only if shown to be plainly unsustainable. This principle was laid down by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. The order of the Court of Appeal in granting the plaintiffs to file their action afresh notwithstanding that the pleading by paragraphs 14 and 20 to 23 indicated that the period of limitation might have set in, was itself a sustainable issue, the merit of which should be determined at the trial. It ought not to be made the subject of a summary procedure under O 18 r 19 to strike out (see paras 16–17).

[Bahasa Malaysia summary

Defendan merayu terhadap keputusan timbalan pendaftar yang menolak permohonan mereka untuk membatalkan pliding plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa tindakan yang difailkan oleh plaintif adalah remeh, menyusahkan dan menyalahgunakan proses mahkamah. Pada mulanya, plaintif telah memulakan satu tindakan di Mahkamah Tinggi Kuala Lumpur tetapi kemudiannya telah dengan persetujuan menarik balik tindakan pertama dengan kebebasan memfailkannya semula. Pada 30 Oktober 2002, plaintif memfailkan satu lagi tindakan di Mahkamah Tinggi Sabah dan Sarawak menuntut relif-relif yang sama seperti ditindakan pertama tetapi memasukkan dua lagi pihak-pihak sebagai defendan-defendan. Defendan-defendan di tindakan kedua gagal memasukkan kehadiran. Hasil dari itu, penghakiman ingkar kehadiran diperolehi oleh plaintif tetapi ia kemudiannya diketepikan oleh hakim dalam kamar. Dalam prosiding yang sama, tindakan plaintif diperintahkan untuk dibatalkan tanpa kebebasan memfailkannya semula. Setelah merayu, Mahkamah Rayuan mengekalkan pembatalan tindakan plaintif tetapi membenarkan plaintif kebebasan memfailkan semula tindakan yang sama di Mahkamah Tinggi Malaya. Berdasarkan perintah Mahkamah Rayuan, plaintif memfailkan tindakan ini terhadap defendan yang sama di mahkamah ini. Dalam prosiding ini, satu-satunya alasan untuk rayuan ini ialah bahawa tempoh had masa telahpun luput menurut s 5 Akta Had Masa 1953 apabila plaintif memfailkan tindakan ini di mahkamah ini pada 19 Oktober 2005.

Diputuskan:

Sesuatu pliding hanya patut dibatalkan sekiranya ia dapat dibuktikan bahawa ia jelas tidak dapat dipertahankan. Prinsip ini dinyatakan oleh Mahkamah Agung di *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. Perintah Mahkamah Rayuan dalam membenarkan plaintif memfailkan tindakan mereka semula walaupun pliding di perenggan-perenggan 14 dan 20 hingga 23 menunjukkan bahawa had masa berkemungkinan telahpun luput, dengan sendirinya satu isu yang dapat dipertahankan, dimana meritnya sepatutnya ditentukan diperbicaraan. Ia tidak sepatutnya dijadikan satu subjek untuk prosedur terus di bawah A 18 k 19 untuk membatalkannya (lihat perenggan 16–17).]

Notes

For cases on application to strike out action, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2559–2562.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Legislation referred to
Limitation Act 1953 s 6
Rules of the High Court 1980 O 18 r 19

Eugene Lee (CY Yap & Lee) for the plaintiffs.
CW Leong (CW Leong & Associates) for the defendants.

Kang Hwee Gee J:

[1] This is my oral judgment: (ex tempore)

[2] This is an appeal by the defendants against the decision of the deputy registrar in dismissing their application to strike out the plaintiffs' pleading under O 18 r 19 on grounds that the suit filed by the plaintiffs were frivolous, vexatious and an abuse of the process of court.

[3] The plaintiffs had initially commenced an action in the Kuala Lumpur High Court vide D4–22–202 of 1998 for the following reliefs:

(i) untuk satu perintah bahawa defendan, pekerjanya, agennya dan/atau penamanya dengan serta-merta berhenti dari melaksanakan apa-apa kuasa dan/atau pengaruh sama ada secara langsung atau tidak ke atas hal ehawal Trafalgar dan/atau UCI dan/atau sebaliknya berhenti dari berurusan dengan syer-syer tersebut atau hak-hak yang timbul darinya sementara pelupusan tindakan ini;

(ii) untuk satu perintah bahawa defendan, pekerjanya, agennya dan/atau penamanya hendaklah mengambil semua langkah-langkah perlu yang serta-merta untuk menyebabkan penggantungan syer-syer UCI daripada urusniaga awam sementara pelupusan tindakan di dalam ini;

(iii) untuk satu perintah bahawa defendan, pekerjanya, agennya dan/atau penamanya hendaklah mengambil semua langkah-langkah perlu untuk menyebabkan pemindahmilikan semula syer-syer tersebut yang telah dipindahmilikkan atau dibenarkan untuk dipindahmilikkan kepada defendan, pekerjanya, agennya dan/atau penamanya oleh penjual termasuk rektifikasi kesemua daftar-daftar syer yang relevan;

(iv) untuk satu perintah bahawa defendan, pekerjanya, agennya dan/atau penamanya hendaklah dengan serta-merta menyebabkan perletakan jawatan tanpa syarat kesemua pekerja, agen dan/atau penama defendan di dalam Lembaga Pengarah Trafalgar dan/atau UCI;

(v) untuk satu akaun bagi segala faedah yang terakru kepada defendan, pekerjanya, agennya dan/atau penamanya akibat pemindahmilikan syer-syer tersebut kepada defendan, pekerjanya, agennya dan/atau penamanya dan/atau pengurusan Trafalgar dan/atau pelaksanaan hak-hak yang timbul daripada syer-syer tersebut termasuk hak-hak berkenaan dengan UCI;

(vi) untuk penyerahan penuh segala faedah dan/atau restitusi yang sama kepada plaintif-plaintif oleh defendan;

(vii) bahawa defendan hendaklah membayar kepada plaintif-plaintif jumlah wang sebanyak RM999,999;

(viii) bahawa defendan hendaklah membayar kepada plaintif-plaintif bunga pada kadar 8% setahun ke atas jumlah wang sebanyak RM999,999 dari 27 Disember 1997 sehingga tarikh penyelesaian penuh dan muktamad;

(ix) bahawa defendan hendaklah membayar kepada plaintif pertama jumlah wang sebanyak RM5,730,800;

(x) bahawa defendan hendaklah membayar kepada plaintif pertama bunga pada kadar 8% setahun ke atas jumlah wang sebanyak RM5,730,800 dari 27 Disember 1997 sehingga tarikh penyelesaian penuh dan muktamad;

(xi) gantirugi untuk pecah kontrak;

(xii) bahawa defendan hendaklah membayar kepada plaintif-plaintif bunga pada kadar 8% setahun ke atas jumlah gantirugi yang diawadkan dari 27 Disember 1997 sehingga tarikh penyelesaian penuh dan muktamad;

(xiii) kos; dan

(xiv) apa-apa perintah dan relief selanjutnya yang mahkamah mulia ini anggap sesuai dan adil.

[4] The plaintiffs later withdrew the first suit with liberty to file afresh by consent.

[5] On 30 October 2002, the plaintiffs filed another action in the High Court of Sabah and Sarawak vide 22–48–2002 seeking the following remedies:

(i) a declaration that the defendants are indebted to the plaintiffs to the sum of RM6,730,800 being monies due and payable under the said agreement;

(ii) an order for the specific performance of the said agreement between the plaintiffs and the first and/or second defendant dated the 1 July 1996 and/or alternatively that the defendants pay the plaintiffs the sum of RM6,730,800;

(iii) general damages in lieu of or in addition to specific performance for breach of contract; breach of trust and/or fiduciary duties and/or conversion;

(iv) general damages in lieu of or in addition to specific performance for fraud, conspiracy and collusion;

(v) further and/or alternatively for payment and/or return of RM6,730,800 in restitution and/or for money had and received for the plaintiffs' use;

(vi) Interest on the said RM6,730,800 at 8% pa from the 16 September 1996 until final settlement or on such sum and at such rate and for such period as the court deems just;

(vii) such other reliefs as the court deems just; and

(viii) costs.

[6] In this suit the plaintiffs are seeking the same reliefs as in the first suit but had joined two other parties as defendants.

[7] The defendants in the second suit failed to enter appearance. Accordingly a judgment in default of appearance was obtained by the plaintiffs but it was subsequently set aside by the judge in chambers. In the same proceedings the plaintiffs' action was ordered to be struck out without liberty to file afresh. A

[8] Upon appeal, the Court of Appeal upheld the dismissal of the plaintiffs' action but allowed the plaintiffs the liberty to file the same action afresh in the High Court of Malaya. The said decision was made on 23 November 2004. B

[9] Relying on the order of the Court of Appeal on 19 October 2005, the plaintiffs filed this action against the same defendants in this court vide D8-22-1520-2005. In this proceedings the only ground for appeal is that the period of limitation had set in when the plaintiffs filed this action in this court on 19 October 2005. C

[10] The defendants contend that under s 6 of the Limitation Act 1953 the plaintiffs must commence their action within a period of six years from the date on which the cause of action accrues that is to say when the defendants allegedly committed a breach of the sales and purchase agreement. D

[11] In their statement of claim, the plaintiffs alleged (in para 14) that the completion date was on 16 September 1996. The paragraph reads as follows: E

> 14. The plaintiffs further aver that the completion date under the said Agreement was on the 16 September 1996 and that all the said Sale Shares were sold and/or transferred to the first defendant and/or its nominees before the said completion date and before the aforesaid Purchase Consideration and/or the Creditor's monies were paid though due for payment during and/or in which period the first defendant and/or its nominees held the said Sale Shares in trust due to the special fiduciary relationship between the plaintiffs and the first defendant and/or its nominees as provided under the said Agreement. F

[12] In paras 20 to 23 of the same statement of claim the plaintiffs had also alleged that after the failure of the defendants to perform their obligation under the same agreement attempts were made at settlement but failed, the last being on or about 4 September 1997 wherein the plaintiffs gave the defendants the ultimatum to pay the sum allegedly owed on or before 26 December 1997. G

[13] It is submitted that more than six years had passed when the plaintiffs commenced this suit. More than six years had also passed even if the period of six years is to run from the date by which the defendants must pay the sum allegedly owed. H

[14] The factual narrative of the event pertaining to the action is not denied by the plaintiffs. I

[15] The application is opposed on two grounds:

(1) The plaintiffs are merely following the direction of the Court of Appeal that they were at liberty to file this suit afresh. Although the issue of limitation appeared not to have been raised at the Court of Appeal, it is to be presumed that arriving at its decision the court must have addressed its mind on the issue of limitation.

(2) The plea of limitation can only be used as a shield and not as a sword.

REPLY BY COUNSEL FOR THE DEFENDANTS

(1) The fact that the Court of Appeal had given the plaintiffs liberty to file afresh does not mean that the defendants are barred from raising a plea of limitation.

(2) It is to be presumed that when the Court of Appeal allowed the plaintiffs to file the action afresh it did not preclude the defendants from raising a plea limitation.

FINDINGS AND DECISION

[16] It is trite that a pleading ought to be struck out only if it is shown to be plainly unsustainable. This principle is laid down by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 per Mohamed Dzaiddin SCJ presided over by Tun Dato' Seri Abdul Hamid Omar LP at p 43:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91) and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in para materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[17] As I see it, the order of the Court of Appeal in granting the plaintiffs to file their action afresh notwithstanding that the pleading by paras 14, 20 to 23 indicates that the period of limitation may have set in, is itself a sustainable issue, the merit of which should be determined at the trial. It ought not to be made the subject of a summary procedure under O 18 r 19 to strike out.

[18] The issue is clearly not 'plain and obvious' for it involves the determination of such questions of the circumstances leading to the making of the order by the Court of Appeal as against the operative provision of the Limitation Act 1953. The plaintiffs have a right to their day in court.

Appeal dismissed with costs.

Reported by Sally Kee